

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RUBEN EDWARD MORA,

Plaintiff,

v.

H. WILLIAMS, et al.,

Defendants.

No. 2:20-cv-0746-EFB P

ORDER GRANTING IFP AND SCREENING
COMPLAINT PURSUANT TO 28 U.S.C.
§ 1915A

Plaintiff, a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983, has filed an application for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 (ECF No. 2). He also requests the appointment of counsel (ECF No. 1).

Application to Proceed In Forma Pauperis

Plaintiff's application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

Screening Standards

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

1 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
2 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
3 relief.” *Id.* § 1915A(b).

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
6 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
7 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).
9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
11 U.S. 662, 679 (2009).

12 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
13 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
14 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
15 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
16 678.

17 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
18 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
21 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
22 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
23 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

24 Screening Order

25 Plaintiff’s complaint asserts Eighth Amendment excessive force claims and Americans
26 with Disabilities Act (“ADA”) claims against five defendants: Williams, Hetrick, Webb, Spong,
27 and Vartanian. According to the complaint, plaintiff is a fifty-one-year-old inmate who is
28 mobility impaired and hearing impaired. He alleges the following: On October 23, 2019,

1 plaintiff was recovering from a toe amputation surgery and confined to a wheelchair. Williams
2 pushed plaintiff's wheelchair backward, such that he and plaintiff were face-to-face. Williams
3 then picked plaintiff up from the wheelchair. Hetrick assisted by pushing plaintiff up against a
4 wall, while Webb grabbed onto plaintiff's left hand and arm. Spong then pushed plaintiff hard
5 from behind him. Together, Williams, Hetrick, Webb, and Spong all body-slammed plaintiff to
6 the floor, causing plaintiff to hit his head, back, and legs against the ground. Hetrick, Webb, and
7 Spong then jumped on plaintiff while he was on the ground and Spong hit plaintiff on his back.
8 Vartanian participated by kicking plaintiff's face while he was on the ground.

9 Liberally construed, plaintiff's allegations state potentially cognizable Eighth Amendment
10 excessive force claims against all defendants. Plaintiff's ADA claims, however, cannot survive
11 screening. The only cognizable ADA claim for money damages – the sole relief sought by
12 plaintiff (ECF No. 1 at 14) – must be brought against a public entity. *Lovell v. Chandler*, 303
13 F.3d 1039, 1051 (9th Cir. 2002). Plaintiff has not named a public entity defendant, but even if he
14 had, his claim would still fail. To state an ADA claim against a public entity, plaintiff must allege
15 that “(1) [he] is a qualified individual with a disability; (2) [he] was excluded from participation
16 in or otherwise discriminated against with regard to a public entity's services, programs, or
17 activities; and (3) such exclusion or discrimination was by reason of [his] disability.” *Lovell*, 303
18 F.3d at 1052. Although plaintiff is allegedly disabled, there are no allegations that he was
19 excluded from participating in any program or discriminated against because of his disabilities.

20 Thus, plaintiff may either proceed with his Eighth Amendment excessive force claims
21 against all five defendant (Williams, Hetrick, Webb, Spong, and Vartanian) or he may amend his
22 complaint to attempt to cure the defects in his ADA claims. He may not, however, change the
23 nature of this suit by alleging new, unrelated claims. *George v. Smith*, 507 F.3d 605, 607 (7th Cir.
24 2007). Moreover, plaintiff is not obligated to amend his complaint.

25 Leave to Amend

26 Any amended complaint must identify as a defendant only persons who personally
27 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
28 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a

1 constitutional right if he does an act, participates in another's act or omits to perform an act he is
 2 legally required to do that causes the alleged deprivation). Plaintiff is not obligated to file an
 3 amended complaint.

4 Any amended complaint must be written or typed so that it so that it is complete in itself
 5 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
 6 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
 7 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
 8 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter
 9 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
 10 1967)).

11 The court cautions plaintiff that failure to comply with the Federal Rules of Civil
 12 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.
 13 *See* E.D. Cal. L.R. 110.

14 Request for Appointment of Counsel

15 Plaintiff also requests that the court appoint him an attorney. ECF No. 1 at 15. District
 16 courts may authorize the appointment of counsel to represent an indigent civil litigant in certain
 17 exceptional circumstances. *See* 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935 F.2d 1015, 1017
 18 (9th Cir.1991); *Wood v. Housewright*, 900 F.2d 1332, 1335–36 (9th Cir.1990); *Richards v.*
 19 *Harper*, 864 F.2d 85, 87 (9th Cir. 1988). In considering whether exceptional circumstances exist,
 20 the court must evaluate (1) the plaintiff's likelihood of success on the merits; and (2) the ability of
 21 the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.
 22 *Terrell*, 935 F.2d at 1017. The court cannot conclude that plaintiff's likelihood of success, the
 23 complexity of the issues, or the degree of plaintiff's ability to articulate his claims amount to
 24 exceptional circumstances justifying the appointment of counsel at this time.

25 Conclusion


26 Accordingly, it is ORDERED that:

- 27 1. Plaintiff's request to proceed in forma pauperis (ECF No. 2) is GRANTED.

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2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in accordance with the notice to the California Department of Corrections and Rehabilitation filed concurrently herewith.
3. Plaintiff's request for the appointment of counsel (ECF No. 1) is DENIED.
4. Plaintiff's complaint alleges, for screening purposes, viable Eighth Amendment excessive force claims against all five defendant (Williams, Hetrick, Webb, Spong, and Vartanian).
5. All other claims are dismissed with leave to amend within 30 days from the date of service of this order. Plaintiff is not obligated to amend his complaint.
6. Within thirty days plaintiff shall return the notice below advising the court whether he elects to proceed with the cognizable claims or file an amended complaint. If the former option is selected and returned, the court will enter an order directing service at that time.
7. Failure to comply with any part of this this order may result in dismissal of this action for the reasons stated herein.

DATED: May 5, 2020.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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v.

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NOTICE OF ELECTION

In accordance with the court's Screening Order, plaintiff hereby elects to:

(1) _____ proceed only with his Eighth Amendment excessive force claims against all five defendants (Williams, Hetrick, Webb, Spong, and Vartanian);

OR

(2) _____ delay serving any defendant and files an amended complaint.

Plaintiff

Dated: